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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re:
PG&E CORPORATION,
- and -
PACIFIC GAS AND ELECTRIC COMPANY,
Debtors.

- ☐ Affects PG&E Corporation
☐ Affects Pacific Gas and Electric Company
☒ Affects both Debtors

** All papers shall be filed in the Lead Case,
No. 19-30088 (DM).*

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Bankruptcy Case
No. 19-30088 (DM)

Chapter 11

(Lead Case) (Jointly Administered)

**SUPPLEMENTAL PRELIMINARY
RESPONSE IN OPPOSITION TO
PHILIP VERWEY FARMS' ("PVF")
MOTION FOR RELIEF FROM
AUTOMATIC STAY TO EXERCISE
SETOFF PURSUANT TO 11 U.S.C.
§§ 362 AND 553**

[Relates to Dkt. No. 1141]

Date: July 31, 2019
Time: 9:30 a.m.
Place: United States Bankruptcy Court
Courtroom 17, 16th Floor
San Francisco, CA 94102

PG&E Corporation (“**PG&E Corp.**”) and Pacific Gas and Electric Company (the “**Utility**”), as debtors and debtors in possession (collectively, “**PG&E**” or the “**Debtors**”) in the above-captioned Chapter 11 Cases (the “**Chapter 11 Cases**”), respectfully submit this supplemental response in opposition to Philip Verwey Farms’ (“**PVF**”)¹ *Motion for Relief from Automatic Stay to Exercise Setoff Pursuant to 11 U.S.C. §§ 362 and 553* (the “**Motion**”). [Dkt. No. 1141]. In support of this response, the Debtors submit the *Declaration of Anthony Keir in Support of Supplemental Preliminary Response in Opposition to Philip Verwey Farms’ (“PVF”) Motion for Relief From Automatic Stay to Exercise Setoff Pursuant to 11 U.S.C. §§ 362 and 553*, filed concurrently herewith.

1. Summary of Opposition.

The relief sought in PVF’s Motion was, and remains, premature and overbroad. The Debtors dispute PVF’s claims as to liability and amount, and they intend to conduct a thorough review during the claims administration process, including objecting to PVF’s claim if necessary. For the purposes of efficient administration of these Chapter 11 Cases, it is in the best interests of the Debtors and the creditor body *as a whole* that claims be evaluated and administered, and if necessary litigated, in a uniform and orderly process, and at a time that makes sense from the standpoint of efficient estate administration. Here, PVF wants to jump ahead of other creditors and, by obtaining relief from stay, to effectively write off \$390,874.17 in debt owed to the Utility, long before the Debtors have turned their reorganization efforts toward the fair and orderly administration of claims.

Moreover, the exhibits that PVF submitted in support of the Motion to substantiate the amount of its claim appear to establish instead that an essential element to setoff under section 553 of the Bankruptcy Code—mutuality of the parties—is lacking as to significant components of the “mutual” debts that PVF seeks to offset. What PVF describes as a two-way dispute between the Utility and PVF actually appears to involve claims by and against several different legal entities,

¹ The motion papers and relevant proofs of claim identify the moving party and creditor as Philip Verwey d/b/a Philip Verwey Farms – in other words, as an individual/sole proprietorship.

1 thus defeating the legally required mutuality. PVF's documentary support for the amount of its
2 claim—particularly the “lost profits” component that comprises approximately 75% of the claim
3 amount—is too sketchy, confusing, and insufficient to establish the prima facie validity of the
4 claim.

5 **2. There Can be No Setoff Without Mutuality of the Parties.**

6 As PVF notes in its memorandum of points and authorities, mutuality for purposes of
7 setoff is strictly construed. *See Newbury Corp. v. Fireman's Fund Ins. Co.*, 95 F.3d 1392, 1399
8 (9th Cir. 1996). Courts strictly construe the mutuality requirement against the party seeking to
9 assert a setoff, and triangular setoffs are prohibited. *See Steadfast Ins. Co. v. Woodside Group,*
10 *LLC (In re Woodside Group LLC)*, Adv. No. 6:09-ap-01429-PC, 2009 Bankr. LEXIS 4360 at *14-
11 15 (Bankr. C.D. Cal. Dec. 30, 2009). The exhibits submitted by PVF in support of its Motion and
12 its Proof of Claim raise several issues regarding mutuality that should be resolved by this Court
13 prior to allowing any relief from stay to effectuate a setoff.

14 The Motion asserts that PVF has a single claim for \$1,234,469.61 against the Utility,
15 arising from damages asserted against PG&E based on PG&E's alleged negligence in “rerout[ing]
16 a circuit regulator” that caused a high voltage surge and explosion, and in subsequent repairs.
17 (Mot. 7.) All of the invoices that were submitted in support of the motion to establish property
18 damage are billed to PVF, but this element only totals \$284,462.61. (Verwey Decl. Ex. C [Dkt.
19 No. 1148] at 5.)

20 The component of the claim for loss of revenue is much higher, \$950,007.00, but a letter
21 from forensic accountants to PVF's insurance carrier submitted in support of the Motion lists a
22 different entity as the insured party. (Exhibit A to the Verwey Declaration, the “HSNO Report”
23 [Dkt. No. 1146].) The accountants' letter refers to the “insured” as Philip Verwey Dairy, Inc. (the
24 “Corporation”). Nowhere in PVF's moving papers or reply is there an explanation of the
25 Corporation's role or relationship to PVF. A search of the California Secretary of State shows that
26 the Corporation is an active California domestic stock corporation with Philip Verwey as its agent
27 for service of process. Perhaps Mr. Verwey is the owner, or perhaps others also own interests in
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the Corporation. But whatever its ownership, PVF cannot set off against its debt to the Utility a claim that, by its own documents, appears to be held by the Corporation, a different legal entity.

On the other side of the setoff equation—the debts owed by creditors to the debtor—the Motion asserts that PVF owes PG&E \$390,874.17 for Usage Charges and Interconnection Charges.² The PG&E bills submitted in support of the Motion show, however, that all of the \$126,358.47 in Interconnection Charges is the obligation of Hanford Renewable Energy LLC (“HRE”), another separate legal entity operated by Mr. Verwey. (*See* Verwey Decl. Ex. F [Dkt. No. 1152]; Verwey Decl. ¶ 2.) The PG&E bills for Usage Charges also include at least one \$524.49 bill to Madera Renewable Energy LLC (“MRE”), another entity operated by Mr. Verwey. (Verwey Decl. ¶ 2.) Claims asserted against PG&E on behalf of PVF (or the Corporation) lack the required mutuality and hence cannot be set off against HRE or MRE’s debts to PG&E.

Another aspect of required mutuality relates to timing: only prepetition debts and claims may be offset. 11 U.S.C. § 553(a); *See In re Watson*, 78 B.R. 267, 273 (Bankr. C.D. Cal. 1987). The bills submitted by PVF are confusing as to how the total Usage Charges of \$264,335.70 were calculated, or more specifically for these purposes, when the charges arose. Many of the bills are dated post-petition and show an aggregate amount owed, without clear allocation to pre- or post-petition periods. To state the obvious, PVF cannot set off its prepetition claims against charges for post-petition utility services.

3. No Setoff Should Be Effected Until PVF’s Claims Are Allowed for a Liquidated Amount.

PVF’s claims against PG&E are disputed as to both liability and amount. (Keir Decl. ¶ 3.) The bulk of PVF’s claims are for lost profits that (apart from apparently being made by a different legal entity, as discussed above) are by their nature “soft” and speculative and cannot simply be accepted at face value. (Keir Decl. ¶ 4.) Since the originally scheduled hearing on PVF’s Motion, the parties have attempted, unsuccessfully, to negotiate a settlement of PVF’s claims. A major

² These terms are defined in the Motion.

1 impediment from PG&E's perspective has been the inability or unwillingness of PVF to provide
2 sufficiently clear and detailed substantiation of PVF's claims. (Keir Decl. ¶ 6.) The Debtors must
3 have enough information to assess how the claimed amounts were calculated and the assumptions
4 on which they are based, in addition to whether and to what extent PVF's losses were in fact
5 caused by PG&E's negligence as PVF asserts.

6 Although PVF is correct that the status of its claim as disputed and unliquidated as of the
7 petition date is not a bar to *claiming* a setoff, for PVF to actually *effect* the setoff, the validity and
8 amount of its claim should be resolved. As a general rule, setoff does not occur unless three steps
9 have been taken: "(i) a decision to effectuate a setoff, (ii) *some action accomplishing the setoff*,
10 and (iii) a *recording of the setoff*." *Citizen Bank of Maryland v. Strumpf*, 516 U.S. 16, 19 (1995)
11 (emphasis added). How can a setoff be "accomplished" or be "recorded" when the amount of one
12 of the offsetting claims and, more fundamentally, its legal validity, are in bona fide dispute? Until
13 PVF's claim against the Debtors has been determined for a liquidated amount, the setoff equation
14 cannot be completed.

15 Litigation (accompanied by discovery) appears to be necessary to determine whether
16 PVF's claim should be allowed, and if so for how much. PVF's Motion is not the proper vehicle
17 for achieving "a full adjudication of the merits" of PVF's claim. *See In re Luz Int'l, Ltd.*, 219 B.R.
18 837, 841 (B.A.P. 9th Cir. 1998) (reversing bankruptcy court for making a final merits adjudication
19 in the context of a motion for relief from stay). A stay relief motion is a summary proceeding, not
20 suited to the adjudication of the underlying merits of a dispute between debtor and creditor. *See*
21 *id.* at 842. The better approach is to determine the validity and amount of PVF's claim through
22 the claims administration process, and to defer any determination regarding PVF's right to setoff
23 pending the allowance (or disallowance) of its claim. *See* 5 Collier on Bankruptcy, § 553.03[1][e]
24 (court has discretion to permit setoff of disputed claim but, because it would have to undo the
25 setoff if the claim is disallowed or allowed for a lesser amount, "resolv[ing] the dispute in the first
26 instance . . . is often the most prudent course, particularly if the dispute is colorable."). A
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1 contested claims objection will allow this Court to determine both the liability and amount of
2 PVF's claims.

3 The Court should not permit PVF to use its request for stay relief to force the Debtors to
4 litigate claims objections prematurely or on an accelerated basis. Nearly 4,000 proofs of claim
5 have already been filed in these Chapter 11 Cases, and nothing under sections 362 or 363 of the
6 Bankruptcy Code grants PVF the right to jump to the front of the line. Granting such relief could
7 invite other creditors to file similar motions to adjudicate or liquidate their claims, which would
8 require the Debtors to take time and attention away from the critical task of formulating a
9 chapter 11 plan to effectively evaluate and administer all of the claims that will be filed by the
10 claims bar date on October 21, 2019.

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1 The injunctive relief requested in PVF's reply brief would be inappropriate in a stay relief
2 motion. PVF could contend that it could be entitled to a form of adequate protection, such as
3 conditioning the automatic stay on the Utility acting in good faith to insulate PVF (but *only* PVF)
4 from further efforts to collect the Usage Charges and Interconnection Charges, which if paid
5 would dissipate PVF's potential setoff rights. The Debtors would not object to such relief, *if and*
6 *to the extent* the Court determines, from the evidence presented in support of and in opposition to
7 PVF's Motion, that PVF has established a prima facie case of potential entitlement to setoff rights
8 based on claims asserted by PVF against PG&E that could, if ultimately established as valid,
9 reduce or eliminate claims by PG&E against PVF. What the Debtors do object to, and what the
10 Court should not authorize or require, is (a) determination at this time that PVF is entitled to
11 *exercise* any setoff rights now, (b) any protection of purported set-off rights relating to PG&E's
12 claims against entities other than PVF, or (c) any requirement that the Debtors accelerate their
13 review of and, if appropriate, objection to the claims filed by PVF.

14 Respectfully submitted,

15 Dated: July 26, 2019

16 **WEIL, GOTSHAL & MANGES LLP**
17 **KELLER & BENVNUTTI LLP**

18 By: /s/ Peter J. Benvenutti
19 Peter J. Benvenutti

20 *Attorneys for Debtors and Debtors in Possession*
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